ZAINUN BINTI ABDUL GHANI & ANOR. v. CHONG AH SENG & ANOR.

[O.C.J. (Wan Suleiman F.J.) August 28, 1974]
[Seremban — Civil Suit No. 188 of 1968]

Tort — Negligence in driving vehicle — Defence of inevitable accident — Blow out of tyre — Negligence of defendant in using worn out equipment.

Damages — Fatal accident — Loss of support.

In this case the plaintiffs sued on behalf of the dependants of one Abdul Rahman bin Ismail for damages arising out of a road accident wherein the said Abdul Rahman bin Ismail was killed. It was alleged that the accident was caused by the negligent driving of the first defendant. The substantial defence was inevitable accident, in that there was a blow out of a tyre before the accident. The evidence of the chemist who had examined the tyre after the accident showed that the tyre was almost bald.

Held: (1) the tyre burst in this case was a neutral event consistent and equally consistent with negligence or due diligence on the part of the defendants. The evidence not only did not show the cause of the blowout but tended to show negligence on the part of the first defendant in using worn out equipment. The defence of inevitable accident therefore failed and judgment must be given for the plaintiffs;

(2) in the circumstances there would be an award of $40,800 as general damages.

Cases referred to:-

(1) *The Albano* [1892] P. 419.
(2) *The Merchant Prince* [1892] P. 179.
(3) *Barkway* v. *South Wales Transport Co. Ltd.* [1948] 2 All E.R. 460, 471.
(4) *Laurie* v. *Raglan Building Co. Ltd.* [1941] 3 All E.R. 322.
(5) *Woods* v. *Duncan, The Thetis* [1946] 1 All E.R. 470.
(6) *Wong Eng* v. *Chock Mun Chong & Ors.* [1963] M.L.J. 204.
(7) *Tan Chye Chao & Ors.* v. *Chong Kew Moi* [1970] 1 M.L.J. 1.

CIVIL SUIT.

O. Tara Singh for the plaintiffs.

R. R. Chelliah (*P. S. Moorthy* with him) for the defendants.

Wan Suleiman F.J.: This is an action for damages filed on behalf of the dependants of Abdul Rahman bin Ismail who was killed in an accident on 24th March 1968 at the 16½ milestone on the main trunk road between Gemas and Tampin. The plaintiffs alleged that the first defendant's negligent and dangerous driving had caused this fatal accident. It is part of the agreed facts that at the time of the accident the deceased was travelling along the road towards Gemas as was the car bearing registration No. SN 2593.

The defendants in their defence pleaded that the accident had been caused solely, or at least substantially contributed to by negligence on the part of the deceased Abdul Rahman bin Ismail, giving particulars of such negligence. In the alternative, the defendants averred that the front near side tyre of the car had suddenly burst as a result of which the first defendant had knocked down the deceased cyclist, who had suddenly and without any warning shot out into the path of the motor car.

Thus whilst still maintaining that the deceased was solely or partly responsible for the accident, the defendants were also raising the plea of inevitable accident in the alternative.

However in the course of their testimony it became obvious that the defendants were no longer pursuing that line of defence alleging negligence or contributory negligence on the part of the deceased, so that all that was left was the defence of inevitable accident.

The plaintiffs called an eyewitness, Ahmad bin Alim whose house was close to the scene of the accident. On the day of that event, he happened to be standing on the verandah of his house when he saw a cyclist who he later recognised to be the deceased, go by in the direction of Gemas. He then saw a car coming up from behind at a speed which he estimated to be about 50 m.p.h. It hit the cyclist from behind. Simultaneous with the collision he heard an explosion which sounded as if a car tyre had blown out. The cyclist was then thrown off the road.

There was then a screeching sound as the car skidded and turned around to face the direction in which it had come i.e. the direction of Tampin town.

It is worthy of note that this witness claimed to own and to drive a car so that it cannot be said that he is not conversant with the ways of motor vehicles.

The witness added that he thought the car was going at more than 50 m.p.h. along that straight stretch of road.

The first defendant said that he had left Kuala Lumpur that day and was bound for Singapore, and had picked up two Malay men bound for Johore Bahru, at Cheras. At about 10.30 a.m. he arrived at the Gemencheh Road, where there was a straight stretch of about half a mile. Presumably this refers to the same stretch of road later described as the 16½ mile Gemas/Tampin road.

There he saw a cyclist going in the same direction, on his near side. There was no other traffic or pedestrian on the road. When he was very close to the cyclist his near side front tyre burst and he jammed on his brakes. He then lost control of his car which skidded and knocked into the cyclist. The car then proceeded for some distance, turned about facing Tampin before coming to a stop.

The car was a 1966 model Mercedes Benz and all five tyres including the spare were of the brand known as Michelin X, which apparently is long lasting.

The defendant said that he serviced his car monthly, and he averaged 600 miles a month. The car was registered in the name of the second defendant, and there is no evidence to show what the latter's monthly mileage was. In any case first defendant claimed to have purchased the tyres in January 1967, presumably new, and had travelled a distance of about 20,000 miles on it. Since the normal mileage expected of these tyres according to him, was 40,000 miles one could say that only 50% of their threads had been worn out. First defendant said that it was his practice to inspect his tyres before starting off on a long journey, and before leaving that morning he had inspected them and found them to be in good condition. He had seen no cracks in them and their pressure was sufficient.

The defendants called as an expert witness Dr. Poon Wai Lum, who was, at the time he examined

the damaged tyre, a Chemist in the Department of Chemistry. Dr. Poon claimed to have examined many damaged tyres (presumably in the course of his duties).

He examined the damaged tyre, torn tube and rim on April 19, 1968, that is, soon after the accident and was of the view that the damage to the tyre and tube were consistent with damage caused by a blow-out *before* impacting a hard object.

The damage he found to be on the inner side wall of the tyre. There were no cuts on the surface of its wall so as to forewarn anyone examining the tyre earlier that there would be a blow-out. Dr. Poon had heard of cases where new tyres had suffered blow-outs, and, obviously referring to new tyres again, added that hidden defects not visible to the eye can cause it, but he was unable to say what had caused the blow-out in the instant case.

Whether a cut on the tyre wall could have caused the blow-out became significant, because the Road Transport Department Examiner's report at "A" Pg. 8 mentions a cut in the side wall of that tyre. Dr. Poon, when referred to this was emphatic that what he had seen was a tear, as a cut would imply contact with a sharp instrument and the cut edge would have been clear. The edges of this tear were irregular and "Z" shaped. The tear caused by impact i.e. an impact fracture would either be shaped like a cross or be T shaped. It was apparently because of its shape that he did not think that impact with the bicycle could have caused the tyre to burst.

I am myself inclined to the view that contact between tyre and bicycle is extremely unlikely at the time the car itself hit it. A glance at the photos on "A" Pg. 6 will show that only the bumper and the front portion of the bonnet would be of the points of impact, though the tyre itself could have run over the bicycle after it had fallen. Judging from the damage to the bicycle in photograph (iv) on A Pg. 6, that clearly did not happen.

There is another apparent difference between the Vehicle Examiner's Report and Dr. Poon's observation, if I am to infer that the tyre though reported by the former to be damaged (A Pg. 8) was threadwise either fair or satisfactory ("S" in paragraph 5) can only mean satisfactory.

Dr. Poon said it was quite bald. Under cross-examination he repeated this description and added that he had made a note that only 5% of the threads were left. That is a far cry from having done 20,000 miles out of a normal mileage of 40.000 i.e. 50% loss of thread as first defendant would have led the court to believe.

It can fairly be assumed from what the first defendant had said that all four tyres were in roughly the same condition.

I would without hesitation accept the impartial evidence of Dr. Poon as regards the condition of the damage tyre thread-wise in preference to that of the first defendant. This expert witness was only given that damaged tyre to examine, and therefore I am in no position to obtain independent and reliable evidence as to the condition of the other three tyres. It may well be that the other tyres were satisfactory or fair as the Vehicle Examiner said they were, even if they were more than half used, but I am satisfied that the near side front tyre, with only 5% of its thread left, in a dangerous state of "baldness" had arrived at that stage when it was neither satisfactory, fair or safe to use before the actual blow-out occurred.

Dr. Poon frankly admitted that it was beyond his domain to say whether violent braking would force the rims (of a car's wheel) into the road surface. This question arose out of the rim marks left on the road. (See sketch plan at A Pg. 3). He also said that he did not consider himself competent to give evidence on the effect of sudden stress and strain upon a tyre due to sudden braking or turning of a car.

Ahmad bin Alim (PW5) gave me the impression of being a truthful person giving to the best of his ability an eye-witness's account of a series of events which took place with bewildering rapidity. There is no evidence to indicate if that area had a 30 m.p.h. speed limit, but the road was certainly straight at that point and the first defendant had still a long way to go, being bound for Singapore, and in all likelihood he was doing a fair 50 m.p.h. rather than a dawdling 30 m.p.h.

Since, for the reasons I had earlier set out, it is unlikely that contact with the bicycle had caused the tyre to burst, the simultaneous explosion he heard must have been a blow-out which happened before contact between tyre and any hard object.

I agree therefore with Dr. Poon that the blow-out was not caused by contact with the bicycle, and that it must have happened before the car struck the cyclist. I would now like to consider the law to determine if the defence of inevitable accident should succeed.

In the first place it has been said that there is no inevitable accident unless the defendant can prove that something happened over which he had no control and the effect of which could not have been avoided by the exercise of care and skill (*The Albano*,[1] per Lord Esher, M.R.).

The burden of proof of inevitable accident of course is upon the defendant or the other person setting it up (see *The Merchant Prince*[2]).

I have found as a fact that the tyre had burst not from impact with the bicycle but at the same time there is no evidence as to the cause of the blow-out. What then is the effect of a finding that there had been a blow-out from some unknown cause upon a defence of inevitable accident? (I am not saying that the probabilities do not point to negligence in using a worn-out tyre).

In a decision of the Court of Appeal in *Barkway* v. *South Wales Transport Co. Ltd.*[3] the facts are as follows. The off side front tyre of the defendants' motor-omnibus burst and caused the vehicle to swerve to the off-side of the road mounting the pavement and falling down on an embankment killing and injuring several of its passengers. Asquith L.J. said (Scott L.J. concurring with him):

"The position as to onus of proof in this case seems to me to be fairly summarised in the following short propositions. (i) If the defendants' omnibus leaves the road and falls down an embankment, and this without more is proved, then there is *res ipsa loquitur*, there is a presumption that the event is caused by negligence on the part of the defendants and the plaintiff succeeds unless the defendants can rebut this presumption. (ii) It is no rebuttal for the defendants to show, again without more, that the immediate cause of the omnibus leaving the road is a tyre-burst, since a tyre-burst *per se* is a neutral event consistent and equally consistent with negligence or due diligence on the part of the defendants. When a balance has been tilted one way you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down. This is the effect of the decision in *Laurie* v. *Raglan Building Co., Ltd.*[4] where not a tyre-burst but a skid was involved. (iii) To displace the presumption, the defendants must go further and prove (or it must emerge from the evidence as a whole) either

(a) that the burst itself was due to specific cause which does not connote negligence on their part but points to its absence as more probable or

(b) if they can point to no such specific cause that they used all reasonable care in and about the management of their tyres: *Woods* v. *Duncan, the Thetis*[5]: second limb (b) of the last proposition is the relevant one for the purpose of this case."

The defendants in the instant case who are unable to point to a specific cause of the blow-out must also show that they used all reasonable care in and about the management of their tyres.

I am not at all satisfied that they had done so. If first defendant had been telling the truth that he inspected the tyres, and I have great doubt whether he was telling the truth, he would have seen what his witness the Chemist had seen i.e. that the near side front tyre was almost bald, and not capable of doing another 20,000 miles as he said it could. If, as there appears to be a strong probability the tyre was almost bald and the other three tyres satisfactory, as the Vehicle Examiner's report makes them out to be, then the first defendant must have been extremely casual with his care and management of his tyres. I would even go further and say that anyone who uses a tyre which is almost bald to go on a long journey can expect a blow-out as a possible consequence.

The defendants relied on the case of *Wong Eng* v. *Chock Mun Chong & Ors.*[6] and *Tan Chye Choo & Ors.* v. *Chong Kew Moi*[7] being authorities in their favour. Both related to latent mechanical defects which resulted in accidents, such latent defects not arising out of negligence on the part of the defendants in those cases. Here, even though the Chemist did say that latent defect in manufacture can cause blow-outs, one can see from the context in which it was said that it referred to new tyres and not the worn-out one with which we are concerned.

The tyre-burst therefore was in the words of Asquith L.J. a neutral event consistent, and equally consistent, with negligence or due diligence on the part of the defendants. The evidence not only does not show the cause of the blow-out but tends to show negligence on the part of the first defendant using worn-out equipment. Accordingly, the defence of inevitable accident must fail and I find in favour of the plaintiffs.

The first plaintiff, widow of the deceased claims loss of support of $200 per month, the amount she said the deceased used to give her monthly. His take home pay was $157.17. She said that he also earned about $90 p.m. doing odd jobs in the kampong. They also tilled their padi lot together producing about 400 gantangs per year. She had ceased doing so since his death, since she had to take to tapping rubber to eke out a livelihood.

The Secretary, Department of Islamic Affairs, Negri Sembilan (PW6) said that though deceased was on the permanent establishment he was non-pensionable at the time of his death. Subsequently, however, as from 1st January 1970 all religious teachers were made pensionable. Had he lived to retire in 1983 at 55 years of age, he would have achieved a salary of $730 p.m., and would have been eligible to pension and gratuity — the latter a sum of $9,491.12 cts.

The Aziz Commission Report, (on the appropriate scale wherein deceased would have been presumably emplaced) had efficiency and promotion bars. Deceased's satisfactory conduct would apparently have made his ascent to the top scale of the salary ladder mentioned very likely.

It was never put to this witness that religious teachers in deceased category were not entitled to be placed on scales in the Aziz Report, but this suggestion appears in the written submission. I have no reason to believe that the Secretary of the Department of Islamic Affairs was not completely conversant with the salary scales pertaining to employees of his department, or had come to court not adequately briefed. In any case it can hardly be argued that deceased was employed in a service with an incremental scale, and that his salary would be considerably more had he lived to retire some 18 years from the date of the accident.

I think that the quantum of loss of dependency claimed i.e. at $200 per month is a fair one. This would include the loss of income from padi growing. Considering the precedents shown in Table III in "The Quantum of Damages" by *Kemp & Kemp*, Second Edition Vol. 2, where for example a multiplier of 20 was adopted for a deceased age 44 years with good future prospects of increased income, taking into account the negligible prospects of marriage of a widow now aged about 37, with six children still at this moment below 18 years of age, and, his good future prospects of much increased salary a multiplier of 17 would be appropriate. I therefore award, under the heading of general damages (for loss of support) $200x12x17 = $40,800. Agreed special damages total $650.

There shall therefore be judgment for plaintiffs for the sum of $41,450 and costs.

Judgment for the plaintiff.

Solicitors: *O. Tara Singh; R. R. Chelliah Bros.*